exercised with caution and there was nothing on the record to show that this witness could not, by care and the use of ordinary means, have been produced to give evidence. We therefore think that this deposition was improperly admitted *Mowyar alias Nane Khan v. The Queen*[12].

For these reasons we order that the conviction be set aside and the sentence quashed.

We are of the opinion that the admissible evidence in the record in regard to the alleged robbery by the appellant in the second coffee-shop was inadequate to support a conviction and that no fresh trial should be allowed in respect of this offence. With regard to the alleged robbery in the first coffee-shop, however, it appears to us that had the trial been otherwise properly conducted there might have been sufficient evidence to support a conviction upon this charge. We therefore order that the accused be re-tried only upon a charge of robbing Tee Puet Kiat.

Appeal Allowed.
Re-trial Ordered.

LEE KIM LAI (f) v. T. R. SUNDRAM AND ANOTHER.

[App. Civil Juris. (Storr, J.) January 28, 1949]

[Ipoh — Civil Appeal No. 11 of 1948]

Civil Procedure Code Ss. 127 and 597 — Application to set aside an exparte decree by a person not a party to the suit.

In this case the appellant had applied to set aside a judgment for possession obtained ex parte against the second respondent. She alleged that she was the real defendant in the Civil Suit and not the second respondent who was her former husband. The District Judge refused her application.

Held, that only a defendant to a suit could apply under S. 127 of the Civil Procedure Code to set aside an exparte decree and not just any person who might be interested in the suit.

Cases referred to :—

(1) *Debendra Narain Sinha v. Narendra Narain Sinha* 24 Cal. W.N. 110 at p. 116.

(2) *Jacques v. Harrison* (1884) 12 Q.B.D. 165.

(3) *Bacha Sham Sunder Keur & others v. Balgobind Singh* A.I.R. 1930 Patna 323.

(4) *Susil Chandra Guha & another v. Gouri Sundari Devi & others* A.I.R. 1926 Cal. 1015.

CIVIL APPEAL.

S. K. Das (*Tan Cheng Hock* with him) for the Appellant.

M. S. Mahendran for the first Respondent.

Storr, J. : — This was an appeal from an Order of the District Judge, Perak South, made on the 18th August, 1948, on an application by the Appellant under Section 127, Civil Procedure Code, to set aside the judgment, obtained *ex parte* against the 2nd Respondent, dated the 11th June, 1948, and the consequent Warrant of Ejectment dated 12th June, 1948, in District Court Civil Suit No. 28/48. The grounds of the application were set out in an affidavit by the Appellant dated 18th June, 1948. These were that the Appellant was in fact the real Defendant in District Court Civil Suit No. 28/48 and the tenant of the 1st Respondent, and not the 2nd Respondent against whom the judgment was entered, being her former husband. The learned District Judge dismissed the application on the grounds that the Summons was duly served on the Defendant (2nd Respondent) named in the Summons by the Plaintiff (1st Respondent) pointing him out to the Process Server and that only a Defendant to a suit could apply under Section 127, Civil Procedure Code, to set aside an *ex parte* decree and not just any person who might be interested in the suit.

Mr. S. K. Das (Mr. Tan Cheng Hock with him) appeared for the Appellant and argued that before the District Judge came to any decision on the application under Section 127, Civil Procedure Code, he should have decided the issue as to whether or not the Appellant was the tenant of the 1st Respondent and the person who should have been served as the Defendant or not, and, if she was so found, to have set aside the decree, but in any event the Appellant being a person interested in the suit was entitled to have the *ex parte* decree set aside under Section 127, Civil Procedure Code, and the Order of the District Judge was wrong. He cited the following cases in support of his submission: *Debendra Narain Sinha v. Narendra Narain Sinha*[1], *Jacques v. Harrison*[2] and *Bacha Sham Sunder Keur & ors. v. Balgobind Singh*[3]. Finally, he submitted that under Section 597, Civil Procedure Code, the Court had inherent powers to do that which would ensure that justice was done.

Mr. Mahendran, who appeared for the 1st Respondent, submitted that the Order of the District Judge was correct not only as to his ruling that Section

127, Civil Procedure Code, only applied to a Defendant and not to any party interested in the suit, but also on the facts before him.

The 2nd Respondent, the Defendant in District Court Civil Suit No. 28/48, though served, did not appear.

The main question raised in this appeal is whether the Appellant had the right, as a person interested in the suit but *not* a party to it, to apply under Section 127, Civil Procedure Code, to set aside the *ex parte* decree against the 2nd Respondent.

I have considered the cases cited by Mr. Das but they are distinguishable from the present case and do not relate to applications under Indian O.9 r 13 (Civil Procedure Code Section 127).

Bacha Sham Sunder Keur & ors. v. Balgobind Singh[3] was a case in which there was evidence that the person applying to be joined as a party under O 1 r 10 (Civil Procedure Code Section 24) had in fact become the tenant of the landlord with his consent, but in the present case there is no such evidence, neither was there any application under Section 24, Civil Procedure Code.

Debendra Narain Sinha v. Narendra Narain Sinha[1] was a case in which the Court allowed Defendants/Respondents to become Plaintiffs/Appellants in an appeal and based its decision on O 1 r 10 (Civil Procedure Code Section 24).

Jacques v. Harrison[2] was a case in which the Court allowed a person interested in a suit to intervene to get an *ex parte* decree set aside. That case was based upon the English O XXVII r 15 which reads :—

> Any judgment by default, whether under this Order or under any other of these rules, may be set aside by the Court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit.

But that is different to our Section 127, Civil Procedure Code, in that there is no specific mention of the defendant being the applicant. Section 127, Civil Procedure Code, reads :—

> In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.
>
> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.

On the point relating to Section 127, Civil Procedure Code, raised in this appeal, Sarkar's Civil Procedure Code (8th Edition) at page 1334 states: "To attract the provisions of Or. IX, r 13 (Civil Procedure Code Section 127), the person seeking the aid of the Court must be a party to the suit", and A.I.R. Commentaries, Code of Civil Procedure (4th Edition (1944)) at page 1755 states: "But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule" (O 9 R 13, Civil Procedure Code Section 127); and in the case of *Susil Chandra Guha & another v. Gouri Sundari Devi & others*[4] which was an appeal from a subordinate Judge rejecting an application by a person interested in the suit but not a party to it under O 9 r 13 (Civil Procedure Code Section 127) to set aside two decrees which had been made *ex parte* on the ground that it was not maintainable, Cuming J. in dismissing the appeal stated: "Admittedly he was not a party to the suit. It seems to me that the application was rightly rejected." Chakravarti J. concurred.

Agreeing with the views expressed above, I am of the opinion that Section 127, Civil Procedure Code, is not available to a person who is not a party to the suit, and that the decision of the learned District Judge was correct.

With regard to the final submission of Mr. Das that the Court had inherent powers under Section 597, Civil Procedure Code, to do what is just, I have considered the evidence and facts from the files that were before the learned District Judge to see, if, assuming he had been wrong in the decision that the application under Section 127, Civil Procedure Code, was not maintainable he could have come to a decision on the merits, or have acted under Section 24, Civil Procedure Code, and joined the Appellant as a defendant in the suit.

The record in this appeal unfortunately does not contain the Notes of Evidence of the first day's hearing on the 23rd July, 1948, in which the files in R.A.B. 109/46 and 141/47 were exhibited as Exhibits P. 1 and P. 2. After calling for the District Judge's Note Book, I have read the Notes of Evidence and the exhibits and the connected R.A.B. file 295/46, which is mentioned in R.A.B. 109/46. Having perused those Exhibits P. 1 and P. 2, I am of the opinion that the learned District Judge could not, on the evidence and facts before him, have come to any other decision than to have dismissed the application whether it had been made under Section 24 or Section 127, Civil Procedure Code. In P. 2 the Appellant, on oath, in her cross-examination, referring to an agreement between her and her husband, the 2nd Respondent, and the tenancy in

question, states: "The landlord was not a party to the agreement. My husband was not prepared to pay maintenance to support my children so I had to bring him to Court. He made the agreement to transfer the tenancy to me so that I could support the children from the proceeds of the rent." Further, in P. 1 it was the 2nd Respondent who, on 21st March, 1946, applied to the Rent Assessment Board for the rent to be fixed at $50/- and *not* the Appellant, his wife.

From the above, and having perused the file in District Court Civil Suit No. 28/48 and R.A.B. 295/46 (a connected file), it is obvious to me that the Appellant, with the connivance of her now ex-husband, the 2nd Respondent, endeavoured by her application before the District Judge under Section 127, Civil Procedure Code, to set aside the *ex parte* decree against the 2nd Respondent, to defeat the just claims of the 1st Respondent.

For the above reasons, this appeal is dismissed with costs.

Appeal Dismissed.

A. NUNN, SINGER SEWING MACHINE CO. v. LOW KAM AND OTHERS.

[App. Civil Juris. (Callow, J.) April 6, 1949]
[Alor Star — Civil Appeal No. 35 of 1947]

Leases and Tenancies (War Absentees) Adjustment Ordinance 1946 — Interpretation of Statutes — Preamble to Statute — Individual hardship.

This was an appeal from the decision of the Leases and Tenancies (War Absentees) Adjustment Board, Central Kedah. The Board had declined the Appellant Company's application for re-occupation, because it felt that the justice of the claim by the appellant company should be subordinated to the hardship the respondents might suffer.

Held, (1) that the Board had not proceeded on the correct principle and had wrongly allowed itself to be influenced by considerations of hardship; (2) that the Appellant Company had a just claim to re-occupy the premises and ought to be put in possession.

Cases referred to:—

(1) *Roneo Ltd. v. Ng Yong Beng & others* Penang Civil Appeal No. 1 of 1947 — Unreported.

CIVIL APPEAL.

Khoo Soon Chee for the Appellant.

Respondents 1 and 3 in person.

Respondent 2 absent.

Callow, J. : — This is an appeal from the decision of the Leases and Tenancies (War Absentees) Adjustment Board, Central Kedah delivered on the 22nd of June, 1947, whereby the Appellant Company was declined an order for re-occupation of the pre-war tenancy of 19 Jalan Merbok.

The appeal came before this Court on the 18th of October, 1947, and the record reads:—

"Respondents absent.
"Counsel for Appellant present.
"Board wrongly exercised its discretion. Hands in judgment by Penang Court, Carey, J."

Order: Referred back to the Board for consideration of question of compensation."

Mr. Khoo Soon Chee for the Appellant Company said there was some argument before the reference back to the Board was ordered, and the wording of the order dated the 18th of October, 1947, inclines to support this. I cannot know more than is on the record. I heard the appeal *de novo.*

The regrettable delay from the date of the reference back, the 18th of October, 1947, to the 30th of December, 1948, when the Board responded is also unknown to me. Counsel for the Appellant suggested that there had been difficulty in assembling the Board. Certainly it would appear that the personnel of the Board which assembled on the 30th December, 1948, were different to those who constituted the Board on the 22nd of June, 1947. I do not think this difference is essential. The second Board simply assessed compensation pursuant to the order of Hill J., given on the 18th of October, 1947.

The order itself is a little enigmatic. Counsel for the Appellant submitted that it showed that my learned Brother had upheld the appeal and the reference back was simply to determine the award of compensation payable in accordance with the provision of section 9 (2) of the Leases and Tenancies (War Absentees) Adjustment Ordinance, 1946, (hereinafter called the Ordinance). I was unable to accept this, and, as already declared, the appeal was heard *de novo,* albeit some months after the Board finally complied with the order.

The first respondent appeared in person; the second Respondent Company did not appear and is reported to have left the premises in question; the 3rd respondent is the landlord who said he was indifferent as to who occupied his premises so long as the rent is paid.

The facts are that the Appellant Company was forced to vacate in December, 1941, consequent upon the Japanese invasion. The Board rightly held the War Absenteeism was proved within the definition thereof in section 2 of the Ordinance.

In 1943 or 1944 the first respondent migrated from Perak. Finding 19 Jalan Merbok vacant he rented it from the third respondent first at thirty dollars per month and later at forty dollars per month. In the upper part of the house the first respondent installed